

**BEFORE THE
FEDERAL MOTOR CARRIER SAFETY ADMINISTRATION**

In the Matter of:

**J.R. SIMPLOT COMPANY
U.S. DOT # 172901**

Petitioner.

**Docket No. FMCSA-2010-0063
(Office of Enforcement and
Compliance)**

**ORDER AFFIRMING DENIAL OF APPLICATION FOR HAZARDOUS
MATERIALS SAFETY PERMIT**

1. Background

On February 18, 2010, Petitioner, J.R. Simplot Company, responded to a January 15, 2010 "Notice of Denial of the 'Hazardous Materials Safety Permit'" (Notice of Denial), requesting administrative review. The Notice of Denial stated that, pursuant to 49 CFR 385.407, Petitioner's hazardous materials out-of-service (OOS) rate was in the top 30 percent of the national average.¹

In its request for administrative review, Petitioner asserted that the safety permit denial was the direct result of an inspection of anhydrous ammonia nurse trailers by Minnesota Department of Transportation inspectors on September 30, 2009, resulting in six OOS violations. Petitioner contended that at the time of the inspections, the nurse trailers were not being offered for transportation and had not been prepared for the upcoming fertilizer season. It averred that every nurse trailer is systematically maintained before each use season and visually inspected before loading and delivery.

¹ See Exhibit A to Response to Request for Administrative Review (OEC's Response).

Because the tanks were not offered for transportation or prepared for shipment at the time of the inspection, Petitioner requested that the six OOS violations be vacated.

On March 24, 2010, the Office of Enforcement and Compliance (OEC) for FMCSA, represented by the Office of Chief Counsel, Enforcement and Litigation Division, responded to Petitioner's request for administrative review. OEC asserted that, absent evidence that, at the time of the inspection, the subject nurse tanks had been recently offered for transportation, had been in transportation, or were about to be offered in transportation, the OOS violations were not properly issued.² Nevertheless, OEC contended that even with the removal of these violations, the requested hazardous materials safety permit (HMSP) should still not be granted.

As of January 15, 2010, the date of the Notice of Denial, Petitioner's OOS rate was 30.77 percent, based upon information from the Motor Carrier Management Information System (MCMIS). The hazardous materials OOS rate is calculated by dividing the number of hazardous materials OOS inspections (8) by the total number of hazardous materials inspections (26) for the preceding 12 months.³ OEC stated that 13 nurse trailers were inspected on September 30, 2009, resulting in the 6 OOS violations. Removal of the 13 inspections and the 6 OOS inspections leaves 15 inspections and 2 OOS inspections, for an OOS rate of 15.38 percent. A hazardous materials OOS rate that

² See 49 CFR 173.33(a)(1) (general requirements for hazardous materials in cargo tank motor vehicles), 49 CFR 173.315(m) (nurse tank requirements), and 49 CFR 171.1(d) (functions not subject to the requirements of the HMR).

³ OEC stated that the OOS rate was 28.57 percent based upon 28 hazardous materials inspections and 8 hazardous materials OOS inspections. Later in the pleading, OEC stated that there were 26 hazardous materials inspections, which is confirmed by the Company Safety Profile from MCMIS, page 9 of 33.

equals or exceeds 4.76 percent is in the top 30 percent of the national average.⁴ OEC concluded that because Petitioner's hazardous materials OOS rate remains in the top 30 percent of the national average, the Notice of Denial should be affirmed.

2. Decision

OEC is correct. The language of the regulation is clear: "FMCSA will not issue a safety permit to an applicant that ... [h]as a ... hazardous materials ... out-of-service rate in the top 30 percent of the national average, as indicated in the MCMIS."⁵ (Emphasis added.) Because Petitioner's hazardous materials OOS rate remains in the top 30 percent of the national average, even with the removal of the 6 OOS inspections, the Notice of Denial is affirmed. Since Petitioner's application for an HMSP was properly denied, it may not transport the hazardous materials, in the quantities indicated, set forth at 49 CFR 385.403.

It Is So Ordered.


Rose A. McMurray
Assistant Administrator
Federal Motor Carrier Safety Administration

5.21.10
Date

⁴ See <http://www.safersys.org/HazMatRates.aspx>. The Safety and Fitness Electronic Records System (SAFER) "provides that the national average is determined based on the previous two calendar years' rates for all carriers...." *In the Matter of Halliburton Energy Services, Inc.*, Docket No. FMCSA-2005-20912, Recommended Decision of Chief Administrative Law Judge, July 1, 2005, at 19.

⁵ 49 CFR 385.407(a)(2)(iii).

CERTIFICATE OF SERVICE

This is to certify that on this 24 day of May, 2010, the undersigned mailed or delivered, as specified, the designated number of copies of the foregoing document to the persons listed below.

Paul C. Derig, EH&S Manager
J.R. Simplot Company
P.O. Box 27
Boise, ID 83707

One Copy
U.S. Mail

Debra S. Straus, Esq.
Office of Chief Counsel
Enforcement and Litigation Division
Federal Motor Carrier Safety Administration
1200 New Jersey Avenue, SE
W61-304
Washington, D.C. 20590

One Copy
Personal Delivery

John Van Steenburg, Director
Office of Enforcement and Compliance
Federal Motor Carrier Safety Administration
1200 New Jersey Avenue, SE
Room W63-316
Washington, D.C. 20590

One Copy
Personal Delivery

U.S. Department of Transportation
Docket Operations, M-30
West Building Ground Floor
Room W12-140
1200 New Jersey Avenue, S.E.
Washington, D.C. 20590

Original
Personal Delivery


